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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

CARLOS HERNANDEZ,

Plaintiff,

vs.

WELLS FARGO FINANCIAL  
NATIONAL BANK,

Defendant.

No. 2:13-cv-01769-RCJ-VCF

Date of Hearing: March 20, 2014  
Time of Hearing: 9:00 AM

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**PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

**I**

**PREFATORY**

Defendant is incorrect in its assertion that its reporting is accurate as a matter of law. First, in attempting to establish its ostensible accuracy, Defendant invokes two unpublished cases neither of which cite the applicable *Ninth Circuit* authority, Drew v. Equifax Information Services, LLC, 690 F.3d 1100, 1108 (9<sup>th</sup> Cir. 2012). One of the unpublished opinions, Molton v. Experian Information Solutions, Inc., 2004 WL 161494, at \*5 (N.D. Ill. Jan 21, 2004), references the Eleventh Circuit's opinion in Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151 (11<sup>th</sup> Cir. 1991) in an errant attempt to define accuracy under the FCRA. The glaring problem with *Cahlin* [other than it's old and not a Ninth Circuit

1 opinion] is that it preceded the establishment of the 1996  
 2 furnisher amendments under which liability under FCRA § 1681s-2(b)  
 3 was framed. It's a case against a national credit reporting  
 4 entity, not a furnisher as defined. Please see Nelson v. Chase  
 5 Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002).<sup>1</sup>  
 6 Defendant's second case, Bolick v. DFS Services, LLC, No. 10-05211,  
 7 2011 WL 4359987, at \*2 (E.D. Pa. Sept. 16, 2011), is a two page  
 8 decision dismissing the complaint of a *pro se litigant* who "failed  
 9 to submit any evidence to substantiate his claim."

10 Second, as referenced in ¶ 19 of the Amended Complaint,  
 11 Defendant has ignored basic credit reporting industry standards,  
 12 Cassara v. DAC Services, Inc., 276 F.3d 1210, 1225 (10<sup>th</sup> Cir. 2002).  
 13 Metro 2 is a reporting format used by furnishers like Defendant.  
 14 The very format embraced by the credit reporting industry itself  
 15 requires furnishers like Defendant to both acknowledge the  
 16 transferred status of any account as well as the account's paid  
 17 status.

## 18 II

### 19 ARGUMENT OF LAW

#### 20 A. Congress Enacted the FCRA to Enhance the Strength and 21 Competitiveness of the Consumer Credit Economy

22 Congress enacted the FCRA in 1970 as Title VI of the Consumer  
 23 Credit Protection Act, 15 U.S.C. §§ 1601-1693r ("CCPA"), its  
 24 omnibus act regulating the consumer credit industry. A recurring,  
 25 core CCPA theme is that prudent dissemination of accurate credit  
 26 information is essential to maintain the vitality of the credit  
 27

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28 <sup>1</sup> Counsel for Plaintiff represented Mr. Nelson.

1 granting system in a competitive and open marketplace to insure the  
 2 health of the nation's multi-trillion dollar consumer credit  
 3 economy and the well being of all its participants, creditors and  
 4 consumers alike.<sup>2</sup> Congress thus made the following formal findings  
 5 in adopting the FCRA:

6 The banking system is dependent upon fair and accurate  
 7 credit reporting. Inaccurate credit reports directly  
 8 impair the efficiency of the banking system, and unfair  
 9 credit reporting methods undermine the public confidence  
 10 which is essential to the continued functioning of the  
 11 banking system.

12 § 1681(a)(1).

13 Congress enacted the FCRA with the expressed purpose to enable  
 14 credit grantors and others to be in the best position to make  
 15 reliable lending and other business decisions. § 1681(a) and (b).  
 16 Likewise, the Truth in Lending Act, Title I of the CCPA,  
 17 establishes the corresponding principle that consumers are best  
 18 served through their own "informed use of credit." 15 U.S.C. §  
 19 1601(a). "Congress enacted the Truth in Lending Act in part  
 20 because it believed consumers would individually benefit not only  
 21 from the more informed use of credit, but also from heightened  
 22 competition which would result from more knowledgeable credit  
 23 shopping." Till v. SCS Credit Corp., 541 U.S. 465, 482, 124 S.Ct.  
 24 1951, 1963 (2004) (quotation and footnote omitted). The Supreme  
 25 Court stated the guiding principle of this congressional philosophy  
 26

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27 <sup>2</sup> Total outstanding consumer credit as of September 2011 was nearly  
 28 \$2.5 trillion. See  
<http://www.federalreserve.gov/Releases/G19/Current>.

1 nearly 40 years ago: "[B]lind economic activity is inconsistent  
2 with the efficient functioning of a free economic system such as  
3 ours." Mourning v. Family Publication Serv., Inc., 411 U.S. 356,  
4 364, 93 S.Ct. 1652, 1658 (1973). Simply put, the viability of our  
5 credit economy depends on accurate information; Congress designed  
6 the FCRA to increase that accuracy.

7 In 1996 Congress amended the FCRA [Pub.L. 104-208 (Sept. 30,  
8 1996)], as explained by the Senate Report:

9 Currently, the FCRA contains no requirements  
10 applying to those entities which furnish information to  
11 consumer reporting agencies. Section 413 imposes certain  
12 obligations upon those furnishers of information to  
13 consumer reporting agencies. The Committee believes that  
14 bringing furnishers of information under the provisions  
15 of the FCRA is an essential step in ensuring the accuracy  
16 of consumer report information.

17  
18 S. Rep. 104-185, 104th Cong., 1st Sess. 49 (1995); see Nelson v.  
19 Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1059-60 (9th Cir.  
20 2002).

21 Among the changes that Congress made was to enact §  
22 1681i(a)(2), which compels CRAs to promptly notify the furnisher of  
23 disputed information of the consumer's dispute, and § 1681s-2,  
24 which imposes on those furnishers of information, such as  
25 Defendant, detailed and specific responsibilities, including the  
26 following duties in subsection (b) [as later amended Pub.L. 108-159  
27 (Dec. 4, 2003)] that are triggered by the CRA's dispute  
28 notification and that Defendant violated here:

1 b) Duties of furnishers of information upon notice of dispute

2 (1) In general

3 After receiving notice pursuant to section 1681i(a)(2) of  
4 this title of a dispute with regard to the completeness  
5 or accuracy of any information provided by a person to a  
6 consumer reporting agency, the person shall--

7 (A) conduct an investigation with respect to  
8 the disputed information;

9 (B) review all relevant information provided  
10 by the consumer reporting agency pursuant to  
section 1681i(a)(2) of this title;

11 (C) report the results of the investigation to  
the consumer reporting agency;

12 (D) if the investigation finds that the  
13 information is incomplete or inaccurate,  
report those results to all other consumer  
14 reporting agencies to which the person  
furnished the information and that compile and  
15 maintain files on consumers on a nationwide  
basis; and

16 (E) if an item of information disputed by a  
17 consumer is found to be inaccurate or  
incomplete or cannot be verified after any  
18 reinvestigation under paragraph (1), for  
purposes of reporting to a consumer reporting  
19 agency only, as appropriate, based on the  
results of the reinvestigation promptly--

20 (i) modify that item of information;

21 (ii) delete that item of information;  
22 or

23 (iii) permanently block the reporting  
24 of that item of information.

25 Federal Courts of Appeals long ago established that the §  
26 1681s-2(b)(1)(A) directive to furnishers to "conduct an  
27 investigation with respect to the disputed information" required a  
28 "reasonable investigation," that is, a "careful" or "searching

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inquiry," as opposed to a "superficial" one, "to determine whether the disputed information can be verified." Johnson v. MBNA America Bank, NA, 357 F.3d 426, 430-31 (4th Cir. 2004); accord Westra v. Credit Control of Pinellas, 409 F.3d 825, 827 (7th Cir. 2005). The Courts of Appeals continue to unanimously follow this "reasonable investigation" standard. Gorman v. Wolpoff & Abramson, L.L.P., 584 F.3d 1147, 1157 (9th Cir. 2009); Chiang v. Verizon New England Inc., 595 F.3d 26, 37 (1st Cir. 2010).

In addition, before the operative events here, federal precedent had also established that § 1681s-2(b)(1)(C)'s duty to "report the results of the investigation to the consumer reporting agency" incorporates the obligation from § 1681s-2(a) "that furnishers have a general duty to provide accurate and complete information" to the CRAs when so responding. Saunders v. Branch Banking and Trust Co. Of Va., 526 F.3d 142, 149-50 (4th Cir. 2008).

The context within which to evaluate Defendant's compliance with § 1681s-2(b)(1)(C) is the function that furnishers' investigation reports serve for the credit reporting agencies (CRA). A CRA is obligated, once it receives the furnisher's report, to determine not only whether the disputed information is "inaccurate or incomplete" but also whether it "cannot be verified." § 1681i(a)(5)(A). This task is at the core of the "grave responsibilities" that Congress entrusted to the CRAs. 15 U.S.C. § 1681(a)(4). It is a task that demands independent evaluation, which naturally requires "more than merely parroting information" received from the furnisher. Cushman v. Trans Union Corp., 115 F.3d 220, 225 (3<sup>rd</sup> Cir. 1997). After all "[t]he FCRA is intended to safeguard against the improper reporting of information

1 on a credit report (either by the credit reporting agency or by the  
2 furnisher of credit information) and against the improper  
3 disclosure of a credit report." Myers v. Bennett Law Offices, 238  
4 F.3d 1068, 1074 (9<sup>th</sup> Cir. 2001).<sup>3</sup>

5 Like many furnishers of information, Defendant has a strong  
6 collection incentive to prevent the CRAs from performing their  
7 duties as Congress has directed. Defendant's conduct in merely  
8 serially parroting verifications would virtually eliminate the  
9 CRA's ability to make substantive evaluations of disputed  
10 information. That restriction in turn would allow creditors, as  
11 Defendant unfortunately demonstrated here, to have a free hand in  
12 using the credit reporting system as a pressure point on vulnerable  
13 consumers. See, Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R.  
14 1993) (a creditor's report of a credit card debt to a CRA is a  
15 "powerful tool designed, in part, to wrench compliance with payment  
16 terms from its cardholder"); accord, Matter of Sommersdorf, 139  
17 B.R. 700, 701 (Bankr.S.D.Ohio 1991); Ditty v. CheckRite, Ltd.,  
18 Inc., 973 F.Supp. 1320, 1331 (D. Utah 1997). Allowing the CRAs to  
19 perform their duties as Congress intended requires furnishers to  
20 report accurate investigation information to the CRAs and not  
21 withhold material information that might aid the CRAs in reaching  
22 either a conclusive decision or a decision that the information is  
23 unverifiable. See, Johnson v. MBNA America Bank, N.A., 357 F.3d at  
24 426, 432 and n. 4 (4<sup>th</sup> Cir. 2004).

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28 <sup>3</sup> Counsel for Plaintiff represented Mr. Myers.



1 B. Accuracy under the FCRA.

2 The Ninth Circuit has defined accuracy in an FCRA furnisher  
3 case:

4 "[A]n item on a credit report can be 'incomplete or  
5 inaccurate' ... 'because it is patently incorrect, or  
6 because it is misleading in such a way and to such an  
7 extent that it can be expected to adversely affect credit  
8 decisions.'" Carvalho v. Equifax Info. Svcs., LLC, 629  
9 F.3d 876, 890 (9th Cir.2010) (quoting Gorman, 584 F.3d at  
10 1163) (emphasis added). Although we have never squarely  
11 addressed the issue, our precedent suggests that, at the  
12 very least, information that is inaccurate "on its face,"  
13 is "patently incorrect." Id. at 891 (noting that there  
14 was no "patent error" because the information reported  
15 was "correct on its face"); see also Koropoulos v. The  
16 Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir.1984)  
17 (suggesting that under § 1681e, a CRA is liable for  
18 reporting information that is "technically untrue," as  
19 well as in various other circumstances). A jury may well  
20 find that reporting the fraudulently opened account as a  
21 lost or stolen account belonging to Drew was untrue or  
22 facially inaccurate. Drew v. Equifax Information  
23 Services, LLC, 690 F.3d 1100, 1108 (9<sup>th</sup> Cir. 2012).

24 Any mere technical accuracy of Defendant's reporting does not  
25 achieve FCRA compliance. The FCRA requires more than technical or  
26 literal accuracy; it requires "maximum possible accuracy of the  
27 information concerning the individual about whom the report  
28 relates." § 1681e(b). To ensure that reporting agencies meet this  
exacting standard, the FCRA authorizes a consumer to institute the  
dispute process as Plaintiff did here to challenge the  
"completeness or accuracy" of any reported item. § 1681i(a)(1)(A).

The District of Columbia Circuit has condemned this type of  
incomplete and misleading entry:

First of all, we do not agree with the district court  
that section 1681e(b) makes a credit reporting agency liable  
for damages only if the report contains statements that are  
technically untrue. Congress did not limit the Act's mandate  
to reasonable procedures to assure only technical accuracy; to  
the contrary, the Act required reasonable procedures to assure  
"maximum accuracy." The Act's self-stated purpose is "to  
require that consumer reporting agencies adopt reasonable



1 procedures for meeting the needs of commerce for consumer  
 2 credit . . . in a manner which is fair and equitable to the  
 3 consumer, with regard to the confidentiality, accuracy,  
 4 relevancy, and proper utilization of such information." 15  
 5 U.S.C. 1681e(b). Certainly reports containing factually  
correct information that nonetheless mislead their readers are  
neither maximally accurate nor fair to the consumer who is the  
subject of the reports.

6 . . . .

7 Applying that interpretation in this case, we find that  
 8 the district court's dismissal of the Koropoulos' claims by  
 9 summary judgment on the grounds that the information in the  
 10 report was technically accurate, regardless of any confusion  
 11 generated in the recipients' minds as to what it meant, was  
 12 improper. We find there is a genuine issue of fact as to  
 13 whether the report was sufficiently misleading so as to raise  
 14 the issue of whether CBI's procedures for assuring "maximum  
 15 possible accuracy" were reasonable.

16 Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40, 42 (D. C. Cir.  
 17 1984) .

18 The Fifth Circuit explained Congress' rejection of a mere  
 19 technical accuracy standard under circumstances where a consumer  
 20 report stated with regard to the consumer's account, "Litigation  
 21 Pending:"

22 Turning to liability under § 1681e(b), any person could easily  
 23 have construed the notation "Litigation Pending" as an  
 24 indication that the plaintiff was being sued by Sherwin-  
 25 Williams, while the actual situation was the reverse. It  
 26 would have been a simple matter to prevent this ambiguity,  
 27 particularly in light of Chilton's knowledge of Pinner's  
 28 dispute with Sherwin-Williams.

29 Pinner v. Schmidt, 805 F. 2d 1258, 1262-63 (5th Cir. 1986).

30 Other courts agree that even "a technical truth . . . can be  
 31 as misleading as an outright untruth where it paints a misleading  
 32 picture." Swoager v. Credit Bureau of Greater St. Petersburg, 608  
 33 F. Supp. 972, 977 (M.D. Fla. 1985) (entry misleadingly coded). In  
 34 Alexander v. Moore & Associates, Inc., 553 F. Supp. 948, 952 (D.

1 Haw. 1982), the court posited another example illustrative of the  
2 defect in Defendant's "corrected" entry:

3 [Section 1681e(b)] does not require that a consumer reporting  
4 agency follow reasonable procedures to assure simply that the  
5 consumer report be "accurate," but to assure "maximum possible  
6 accuracy". Otherwise it would seem that a consumer reporting  
7 agency could report that a person was "involved" in a credit  
8 card scam, and without regard to this section fail to report  
9 that he was in fact one of the victims of the scam. This  
10 result cannot have been contemplated under the Act.

11 The Fourth Circuit agrees that "A report is inaccurate when it  
12 is 'patently incorrect' or when it is 'misleading in such a way and  
13 to such an extent that it can be expected to [have an adverse]'  
14 effect. Sepulvado v. CSC Credit Servs., 158 F.3d 890, 895 (5th  
15 Cir. 1998)." Dalton v. Capital Associated Indus., Inc., 257 F.3d  
16 409, 415 (4<sup>th</sup> Cir. 2001) (if report could be read as stating that  
17 Dalton was found guilty of a felony, when he pled to a  
18 misdemeanour, its inaccuracy would be established). As applied to  
19 this case, if the report could be read as stating that Plaintiff's  
20 account was neither transferred nor paid, its inaccuracy is  
21 established.

22 The standard for accuracy under the FCRA is not *sui generis*.  
23 This type of critical omission of a material fact also constitutes,  
24 for example, misrepresentation under common law (Restatement of  
25 Torts (Second), §§ 529, 551) and deception under the Federal Trade  
26 Commission Act of 1934. Sterling Drug, Inc. v. FTC, 741 F.2d 1146,  
27 1154 (9th Cir. 1984) ("failure to disclose material information may  
28 cause an advertisement to be deceptive, even if it does not state  
false facts"); Simeon Management Corp. v. FTC, 579 F.2d 1136, 1146  
(9th Cir. 1978) (deceptive to omit material fact which could affect  
the consumer's decision to buy); Resort Car Rental System, Inc. v.

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1 FTC, 518 F.2d 962, 964 (9th Cir. 1975) (trade name Dollar-A-Day has  
2 a decisive connotation which is deceptive).

3 C. The Ninth Circuit has defined accuracy in an FCRA  
4 furnisher case in the Disjunctive.

5 Information on a credit report is inherently inaccurate if it  
6 is either patently incorrect or misleading, *Drew*, 1108 (pg. 8,  
7 supra). Here Defendant neither reported the account's paid status-  
8 notwithstanding explicit notice-nor its subsequent transfer.  
9 Plaintiff's dispute was not only sent to the national credit  
10 reporting agencies, but also, Defendant itself (Amended Complaint,  
11 Exhibits 1-3). Despite the crystal clarity of Plaintiff's dispute  
12 Defendant facilely "verified" the accuracy of its reporting sans  
13 any reference to either the account's paid status or that the  
14 account had been transferred. Further, in an obvious effort to  
15 correct the misleading nature of its reporting Defendant finally  
16 updated Plaintiff's account to include both the paid status and its  
17 subsequent transfer (Amended Complaint, Exhibits 4-5). This  
18 attempt to clarify the status of the account exemplifies its  
19 inherently misleading status.

20 In 2002, the honorable Lloyd D. George, Senior District Court  
21 Judge, rendered a decision holding that a subsequent  
22 "clarification" of an account status belies its previous misleading  
23 content:

24 Ironically, in an effort to show this Court that the  
25 credit report is not misleading, Experian points out that  
26 the Spellman's credit report itself notes that the  
27 "Primary borrower filed bankruptcy." However, and in an  
28 apparent effort to ensure that this Court recognizes that

1 "primary borrower" does not refer to Spellman but to his  
 2 former spouse, Kathleen, Experian's quote to this Court  
 3 from the credit report modifies the sentence by adding  
 4 the name of the former spouse in square brackets:  
 5 "Primary borrower [Kathleen Spellman] filed bankruptcy."  
 6 Experian's resort to modifying the credit report to  
 7 specifically identify Kathleen as the primary borrower  
 8 best exemplifies that Spellman has adequately alleged  
 9 that the credit report is misleading Spellman v. Experian  
 10 Information Solutions, Inc., 2002 WL 799876 (D. Nev  
 11 2002).<sup>4</sup>

12 Here Defendant's resort to modifying Plaintiff's tradeline  
 13 "best exemplifies" that its prior reporting is indeed misleading.

14 D. It Is Essential That Defendant "Speak the Same Language"  
 15 as the Remainder of the Credit Industry.

16 In Cassara v. DAC Services, Inc., 276 F.3d 1210, 1225 (10<sup>th</sup> Cir.  
 17 2002), the 10<sup>th</sup> Circuit recognized the essential nature of a common  
 18 industry language, standard and reporting framework prerequisite to  
 19 maximizing the accuracy of information contained in a consumer's  
 20 report. Here, the Defendant failed to comport with the industry  
 21 standard, notwithstanding evident means to achieve it.

22 But if employers in that industry are to communicate  
 23 meaningfully among themselves within the framework of the  
 24 FCRA, it proves essential that they speak the same  
 25 language, and that important data be reported in  
 26 categories about which there is genuine common  
 27

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28 <sup>4</sup> Counsel for Plaintiff represented Mr. Spellman.

1 understanding and agreement. Likewise, if DAC is to  
2 "insure maximum possible accuracy" in the transmittal of  
3 that data through its reports, it may be required to make  
4 sure that the criteria defining categories are made  
5 explicit and are communicated to all who participate.  
6 Id.

7 As noted, Metro 2 software is used by the credit reporting  
8 industry to establish applicable uniform standards:

9 Metro 2 is a standardized reporting format used by  
10 furnishers to provide information about customer accounts  
11 to CRAs. The Metro format software had been around since  
12 the 1970s. Metro 2 is the version created after the 1996  
13 amendments to the FCRA. It was designed by the credit  
14 reporting industry, including the so-called "Big Three"  
15 nationwide CRAs: Equifax, Experian and Trans Union.

16 The Metro 2 format and instructions are available  
17 for users from CDIA and from each of the major CRAs.  
18 CDIA's website also contains valuable information about  
19 Metro 2. The format and instructions were initially  
20 published in 2000 as the Credit Reporting Resource Guide,  
21 which is updated periodically. The book is also called  
22 The Metro 2 Manual. Fair Credit Reporting, 8<sup>th</sup> Edition,  
23 pg. 245, National Consumer Law Center, 2013.

24 Attached as Exhibit 1 is an excerpt from the Credit Reporting  
25 Resource Guide. Exhibit 1 reflects the Industry Standard which  
26 requires, if applicable, *both* annotation of the account's status to  
27 reflect both payment in full for less than the full balance and  
28 transfer of the account. Defendant initially provided neither of

1 these revisions instead reporting the account as a charge-off  
2 without any regard to the transfer (Amended Complaint, Exhibit 4).  
3 Defendant failed to make the necessary revisions until after this  
4 action was filed (Amended Complaint, Exhibit 5).

5 **III**

6 **CONCLUSION**

7 For the foregoing reasons, Plaintiff requests the denial of  
8 Defendant's Motion to Dismiss.

9 Dated: February 10, 2014

10 Respectfully submitted,

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## Exhibit 6

## Special Comment Codes

### By Category Within Portfolio

Category	Description	Credit Line	Installment	Mortgage	Open	Revolving
Special Payment Arrangements, continued	Voluntarily Surrendered, then Redeemed	-	AO	-	-	AO
	Account Paid in Full for Less than the Full Balance	AU	AU	AU	AU	AU
	Account Paid from Collateral	AX	AX	-	-	AX
	Paid by Company which Originally Sold the Merchandise	-	BN	-	-	-
	Paid through Insurance (Requires Account Status Code 13 or 61-65 and Current Balance = 0)	BP	BP	BP	BP	BP
	Principal Deferred/Interest Payment Only	-	BT	-	-	-
Transferred	Account Closed Due to Transfer	AT	AT	AT	AT	AT
	Loan Assumed by Another Party (Requires ECOA Code T — Terminated)	-	H	H	-	-
	Account Transferred to Another Lender	O	O	O	O	O
	Purchased by Another Lender	AH	AH	AH	AH	AH
	Student Loan — Permanently Assigned to Government	-	AL	-	-	-
	Account Acquired by RTC/FDIC/NCUA	AN	AN	AN	AN	AN
	Transferred to Recovery (Requires Account Status Code 71-97)	BA	BA	BA	BA	BA